233018

STATE OF MICHIGAN
SEVENTH JUDICIAL CIRCUIT COURT (COUNTY OF GENESEE)

THE PEOPLE OF THE STATE OF MICHIGAN,

V

SHAREE PAULETTE MILLER,
Defendant.
_____/

00-6086-FC
HON. JUDITH A. FULLERTON

MOTION REGARDING EVIDENCE

BEFORE THE HONORABLE JUDITH A. FULLERTON, CIRCUIT JUDGE
Flint, Michigan - Saturday, December 2, 2000

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Saturday, December 2, 2000 - at 9:19 a.m.

THE COURT: All right, this is the matter of People versus Sharee Miller, case number 00-6086-FC.

Ms. Mabry appears for the People as well as Mr. Plummer, and Mr. David Nickola present for the defendant.

This is the date and time for a hearing on defendant's motions. The motions include the Motion to Quash and a Motion in Limine.

The People also filed a Motion in Limine, but I think the same issues really are at stake in all of the motions, and the Motion to Quash deals with Judge Hughes' decision to bind the case over to circuit court, and the basic underlying objections filed by the defendant and supported by the brief is the various hearsay documents or statements were admitted during the preliminary examination without which there would not have been sufficient evidence to bind the defendant over to circuit court.

The counsel were kind enough to provide the transcript of the hearing before the district judge as well as copies of the exhibits offered and received by Judge Hughes. So I think we are ready to proceed with the arguments now on those motions. Excuse me.

For the People, Ms. Mann or Ms. Mabry. Are you and Mr. Plummer going to divide the duties or how do you expect to do it?

MS. MABRY: Judge, as you know Mr. Plummer filed a brief memorandum today. While I will have brief comments, he would also like to follow them up.

MR. NICKOLA: Judge, if I could--

THE COURT: Well, I only wanna have one person speak on one issue is what I guess I'm trying to get to because it'll be very confusing if we breakdown every issue and have two arguments, we will never get through this one thing.

Are you going to split it up on each issue or are you gonna, I mean, what--what do you wanna do?

Mr. Plummer, how do you wanna do it?

MR. PLUMMER: Thank you, your Honor.

If we could, your Honor, I'd ask the Court to consider Ms. Mabry as the lead prosecutor on these arguments, and I would like to be allowed to speak to the issues that deal directly with the--the electronic pieces of evidence, the e-mails and the instant messages if I could--

THE COURT: Well, let me make this comment. I think those issues are foundation issues that deal with a foundation that was laid before Judge Hughes. I don't

perceive that as the issues that are before the Court today. He ruled those documents were admissible at the time and assuming the foundation is laid at trial, I'm assuming the foundation will be laid, and now we are dealing with the documents that were retrieved from AOL and/or from disks that I believe were found in Missouri, that's where I think they were found.

MR. PLUMMER: Thank you, your Honor.

In that case, Ms. Mabry would be arguing the other issues, thank you.

THE COURT: Mr. Nickola, just to be certain, this morning I received for the first time two supplemental memoranda of law, really I don't think there is anything we haven't heard about before today, but just to be certain, did you get copies of each of those and they were signed in this case by Mr. Plummer?

MR. NICKOLA: Yes, your Honor, I--

THE COURT: They appear to be the originals I have received, so I'm assuming everybody got a copy.

MR. NICKOLA: Yes, Judge, I--I received actually two memorandums, one of which Mr. Plummer has represented to me and I have no reason to not accept that representation, is a memorandum, it is titled Memorandum of Law Regarding Admission of AOL Instant Message of Cassaday Letter to Mom and Dad. He has indicated that

this is very similar, if not virtually identical to the brief that was at least submitted to me at the district court level. I--I don't know for a fact as to whether that was filed at the district court level, but I do recall seeing that at the time.

Secondly, I have received as of this morning a memorandum of law regarding application of U.S. versus Canan, 48 Fed 3rd 954, 1995 case, to the Michigan Court Rules of Evidence, that was given to me about five minutes before we started.

I also received some other information that basically detailed some of the issues from the prosecutor and some proposed jury instructions, but for purposes--

THE COURT: Right, I don't think that we are gonna--today is definitely what we wanna cover is the Motion to Quash and have that finished and if we have time today we can discuss any other issues that we need to cover prior to trial. Anything you want.

Now, anyway, if we are ready to go, let's start. I think the logical starting place to me would be to deal with this so-called suicide note which was already really briefed by Ms. Mann, but this motion or this memorandum today, I think you call it the Cassaday letter to mom and dad, I call it the suicide note and whether--

MR. PLUMMER: It is referred to as a suicide note within the--the memorandum--

THE COURT: That is what I think it has been referenced as in the preliminary exam.

MR. PLUMMER: That's correct.

THE COURT: That seems to be a logical starting point to me, so.

All right, Mr. Nickola, moving to quash go right ahead if you wish, please, and then we will move--after that one we will talk about the telephone conversation of Jerry Cassaday to his--or with his brother, and then we can go into the, I think it's 196 e-mails, etc.

MR. NICKOLA: Thank you, Judge.

Judge, as it relates to the Motion to Quash, I think that I had laid out many arguments in my brief to the Court with attached exhibits as it relates to the highlights, and a couple of additional matters because I know that at least the Court provided us with some federal law the Court was interested in.

In--in this particular case, Judge, I believe the judge, in a nutshell, abused his discretion in admitting the two crucial exhibits that he utilized to bind the matter over. I think that in reality where this issue falls in is what has been described as a suicide note as well as the AOL Chat Instant Message.

These are the two documents that the court obviously relied on and I don't think that there was a whole lot of argument that, absent those two documents, the prosecutor had no direct proof that Jerry Cassaday had any involvement in--in this homicide.

Now, where I believe the court was erroneous in this particular case is--is that he relied on these two hearsay statements off each other. They were issues that when he made his ruling that each of them should be deemed inadmissible and he made a ruling that they were admissible, but both of these documents are hearsay.

Now, as it relates to the suicide note, we believe that the court admitted it, did not follow the proper analysis in this particular case. We didn't believe that it was against Mr. Cassaday's penal interest, I think that I laid that out as it relates to my case, but I would also indicate as well that it--it was quite obvious that in the suicide note in and of itself as he admitted it under 804(b)(3), statement against interest, the court did not delineate the factors, number one. We believe that Mr. Cassaday faced under the criteria set forth in the Williamson versus U.S. case, 512 U.S. 594, it's a 1996 case, that first of all he has got to show that he is unavailable. I don't think that there is too much of a dispute regarding that but--

THE COURT: There isn't any dispute, is there?

MR. NICKOLA: No, not--not--not that he is unavailable.

THE COURT: The first--we have past the first hurdle?

MR. NICKOLA: Right.

The second issue, Judge, at that point is whether or not it was against his penal interest, and it's our position that it was not against his penal interest for the reason and the simple fact is that at the time of the making of the statement he had no penal interest, there was no penalty that he was facing because in and of itself, the suicide note says he is taking his life and he is killing himself, that he is not going to go to prison. And so, we would suggest, and--and I would cite in--in support of that the case of U.S. versus Fowlie, F-o-w-l-i-e, 24 Federal 3d 1059, 1994, that was cited in the Burrera case that was supplied to the Court, my understanding is late this week and to myself, which indicated that the individual, who was out of the country, had made a statement which would normally have been recognized against his penal interest. However, because he was out of the country and was not facing any type of criminal culpability, simply because he was out of the country, that the declaration was not against his

penal interest.

We think in this particular case if I'm going to commit suicide, then clearly I'm not facing any penal interest. I don't think that the court really did the analysis as it relates to that, but we feel that in particular the 804(b)(3) statement against penal interest was not applicable to the suicide note.

I--I believe also that he had allowed it in under the catch-all exception, 804(b)(6), and again we would indicate that he in--in both of these cases he utilized the instant message and utilized the--the hearsay suicide note against each other. In other words, both of these issues were up and he used both of these hearsay statements basically as the primary source for validating the other one in terms of corroborating evidence. I believe that the case law I have cited suggests that's not something that the court can do, not utilizing hearsay to gain hearsay access to admission.

I think that what was pretty clear, Judge, is that the suicide note, in and of itself, for a variety of different factors is not under the standard set forth in Williamson versus U.S., something that is reliable or has the indicia of reliability. If we get to the factor beyond the statement against penal interest, and the Court feels that it was against his penal interest even

though he had--was clearly not going to be facing any charges, we get to the issue of whether or not there is reliability. And the case law is very clear that the reliability of this particular document must stand on its own. The court can't use corroborative evidence to have that matter admitted.

And in this case it's a suicide note where an individual just says, I did it. I drove there and killed him, and he goes on and on and on in terms of blaming Sharee Miller and actions of, and so forth, which are what I would consider to the Court non-inculpatory statements, that's a shift of the blame and as we saw in both the Williamson cases I previously cite and U.S. versus Canan, 48 Federal 3d 954, 1995, that a single declaratory that the Supreme Court held in the Williamson case, a single declaration of inculpability may be something that the Court can take into consideration, but the court in its thorough analysis in the Williamson case felt that other statements that were not directly inculpatory should not be taken into consideration. Judge Hughes definitely did that. He went through and--and--and had actually cited some of these things about mother and father, and the person's suicide. And he did not focus on the one particular issue in terms of the reliability of that document which was

the one inculpatory statement.

And I would also indicate that Justice Scalia in the Williamson case provided particular detail in terms of his belief that in, at least in that particular case, that even though there is an inculpatory statement, if it is so interwoven with other statements that are not inculpatory, then it--it--the whole thing should go out, and the only thing really that is inculpatory in the suicide note on its face is the one separate sentence that said that I drove there and killed him. Everything else seeks to shift the responsibility and shift the blame to Sharee Miller. And that--very similar to one of the cases that were cited by counsel, that being the Barrera case, where this gentleman, Copeland, had said yes, I stabbed a particular person, everybody else was involved in it. In that particular case, Judge, as we see here, the other statements, everybody else is at fault should never even have been analyzed, and no other evidence should be utilized by the court to help buttress whether or not this document in and of itself is reliable. That is not what Judge Hughes did. Judge Hughes specifically utilized the instant message to help buttress that.

I believe he also felt that as it relates to, well, that's--that's what I have to argue in terms of

the--the why I believe Judge Hughes was--was erroneous in terms of his bind over decision. I don't think there was a proper analysis. I think he took the suicide note as a whole, he didn't go through the process that was delineated in Williamson, looking at the statement and each inculpatory statement, and applied towards all the other statements, and I think that that's fatal in this particular case because if you simply take the whole suicide note and admit it, then what we are dealing with is a document that in and of itself is spent blaming other people, shifting the responsibility and I think that the case law that is before the Court clearly indicates that that's an improper analysis.

I--I also would indicate that he is using other evidence to help corroborate the credibility of Jerry Cassaday. I believe that's very clear in Canan that that is--that is not the analysis the court should go through. A single declaration. What we are dealing with, 804(b)(3), is a single declaration or remark. Sentence by sentence as the court had indicated. And--and in those particular cases, some of the cases that are before the Court, in particular Canan, even though as--as counsel correctly pointed out when I briefly looked through the brief that was given to me before we started here, in that particular case the majority had

said, well, this video deposition that was used by this declarant in that particular case should be admitted. They looked at the totality of the circumstances and found that there was indicia of reliability. So far different, Judge, so far different in this particular case than any example that is before this Court. Whether it is the cases that the--the prosecutor has dropped off here, the Michigan cases, whether the federal cases, all of these cases, and when you look to the examples they are all so distinguishable because these are statements made by other individuals and in this particular case Mr. Cassaday is--is gone at his own hand. He is the one who killed himself. He chose to intentionally kill himself without giving any details in this particular case regarding this suicide note. And as a result of not giving any details of the suicide note, that in and of itself is something that should be questionable because there should be an ample amount of --of details. And in reality, what the court had--the court's function is, is that the Court as it relates to the confrontational issue concerning that suicide note, the Court must look and make a determination as to whether my client's confrontational rights were violated by finding if this matter is in fact--it does have the trustworthiness, then the next aspect for the Court to

look at is whether or not my *rights*, my client's rights to confrontation which is number *one*, to face the declarant in court, and number two, have an *opportunity* to cross-examine it, cross-examine the particular individual, whether or not that would not provide any additional questions as far as credibility is concerned. And I would suggest to this Court that to--to say that cross-examination would not--would not add or would not cut into this just bold statement that I drove there and killed him, Judge, is ridiculous.

It's my client's--I think that the Supreme Co and the federal cases that the Court has before it tainly discussed the critical and deepward(sic) in ture of--of cross-examination. And--and I think circumstances with these other cases where the have looked at it and said, hey, this is an that we think cross-examination would not h the--the statement. The statement was tr and of itself, are statements such as i where we are talking about a video dep defendant was actually sitting there should have had an opportunity or portunity to be sitting there lis deposition. But in this have no opportunit

Cassaday. Why; where; how; give me a gas receipt; give me--where is your gun; what did you do; how did you do it? There is absolutely nothing, devoid of detail and we are dealing here, Judge, with an--an individual as well, and one of the key elements that the Court asks us to look at is the spontaneity of it all. The spontaneity and the time in which the declarant had made the statement, and we are talking about three months after his death. Three months in which to concoct and contrive and to manipulate and to fabricate, and the lower court record was clear from the testimony of Donald Copely, that the instant message which Judge Hughes relied upon to bring in the suicide note, the instant message was subject to fabrication, manipulation, the changing. This individual had a relationship, I think that the record did show that, the relationship apparently had ended, but we know that Mr. Cassaday was an alcoholic, we know that he was depressed. He know--his own mother said that he had been suicidal well before he committed this suicide. So we are obviously dealing with a person who has got a serious psychological problem.

So when we deal with these factors I don't believe that Judge Hughes did the proper analysis in binding this matter over before this Court. He should have

gone through it line by line, and he would have seen that only one line was inculpatory, but it was so intertwined with the other individual and shifting the blame away from himself, that it should not have been brought in at all.

And number two, he should have never used the instant massage to buttress it because that is unreliable as well, that's hearsay. In--in fact these are two big issues that are--that are--as far as the analysis are very similar as--as the Court knows, and as a result of that it was improper to take that into consideration.

Now, I think that clearly looking at his bind over that--and minus the suicide note, he can't buttress the instant message because he also used the suicide note to buttress the instant message. So he is playing these two documents that are unreliable and that are generated or at least in the possession of Jerry Cassaday, this individual, to put this whole case together.

I believe that also there is an indication that it showed a conspiracy and he allowed it in under that aspect as well, but I would suggest, and I think that the case law was clear, and I had cited People versus Gay then and now in my brief and Motion to Quash, that conspiracy cannot be maintained by hearsay evidence. And the judge simply used hearsay evidence to support

the conspiracy because, Judge, in--in reality absent these two hearsay documents and--and neither one of them are--are--were admitted under any firmly rooted exception, absent these two hearsay documents, there is no independent *prima facie* case of hearsay pursuant to--as I had cited in the Vega case, and in longstanding People versus Atley, they cannot support it, at all. There is never an indication; there is never a plan; there is never a discussion; there is never like we're gonna get him, anywhere else, and they are not going to argue that, absent the instant message and absent the suicide note. So when the judge bound this matter over he did not go as well through the instant message in the same aspect, I don't need to go over it again, but in terms of the analysis pursuant to Williamson and the analysis pursuant to Canan which would require him to do so. And I believe that the--the Canan case also had indicated that this analysis should be done to all the hearsay exceptions that are--are a part of the 804, the court must make that analysis. And for the same reasons that--that the Williamson case was sent back to have the court do that re-analysis, the same reasons that this Motion to Quash should be granted, because Judge Hughes did not do the proper analysis and he bound this matter over by buttressing two hearsay statements against each other,

and I believe that that was abuse of discretion clearly, and I think that that is supported by the cases that I've relied upon.

So we'd ask the Court to grant the defendant's Motion to Quash.

MR. PLUMMER: If I may, your Honor, Peter Plummer for the People.

I guess what I would like to do, your Honor, is, first of all, I would be willing to concede that without the suicide note and without the instant message the People would agree--

THE COURT: Well, let's be clear, when you say that, there was more than one and I think you're referring to the one that appears to be dated November 8, '99, is that correct--

MR. PLUMMER: The instant message?

THE COURT: Yes.

MR. PLUMMER: That's correct, your Honor, at--

THE COURT: I just wanna be sure we're all on the same, because we haven't specifically referenced it today.

MR. PLUMMER: Thank you, your Honor.

The instant message I'm speaking of, I think the testimony was that it appeared to be created in late evening on November 6th, past midnight on November 7th--

THE COURT: Well, maybe I'm looking, let's see if I have it here, just a second.

Why don't you and Mr. Nickola have a copy of the exact one you're looking at so I'm sure that I have the one you're looking at.

The copies I have aren't marked, so I don't know if they were the ones introduced or shown to the judge, I have no way of knowing that right now, but--

(Court talking to clerk)

I'll show you what I have, I can't tell you, at the bottom there is a date November and I think that's the one you're referring to.

MR. PLUMMER: Is it a six or an eight?

UNIDENTIFIED MALE: It is actually an eight, that is when it was printed--

MR. NICKOLA: Yes, Judge, the--

THE CLERK: Was printed out--

MR. NICKOLA: --the document that the court officer possesses and is returning to the Court is the document that when--when I--

THE COURT: That you all are referring to?

MR. PLUMMER: That's correct--

MR. NICKOLA: In terms of my--

THE COURT: Maybe we ought have, well, I don't know, how you--do you have really clean copy of it that

you want to make ultimately the exhibit, I suppose we could have Ms. Christman mark it now and it can maintain that number through all the rest of the proceedings, if that is agreeable?

MR. NICKOLA: Sure. That's--that's agreeable with me, Judge.

THE COURT: So we don't have to remark it and it will stay the same number forever through these--this case.

MR. NICKOLA: And, Judge, just for purposes of the record, when I had been arguing to the Court referencing the instant--instant message, what is about to be marked here I would agree is what I was talking about. That's the chat as described in the lower court, Sharee 1013, and JLC 1006, and the suicide note I believe is gonna be marked as well and I would agree that that has been previously marked as Proposed Exhibit Number 8, I believe, at the district court level, and then the instant message chat was previously marked at the district court level as Exhibit 9.

MR. PLUMMER: Your Honor, if we could have the suicide note marked as People's Evidentiary Exhibit 1.

THE COURT: Let's have it be one, right.

MR. PLUMMER: Okay. And the instant chat as Exhibit Number 2.

THE COURT: All right, that's fine, she will do that now and they will maintain those numbers throughout these proceedings then.

(At 10:44 a.m. PX# 1 and 2 marked)

MR. PLUMMER: Thank you, your Honor.

THE COURT: Thanks, Mr. Plummer, sorry to interrupt you, but I just wanna keep it clear.

MR. PLUMMER: Rather get it straight from the beginning, your Honor.

Your Honor, there is some discussion about the--the whole fact of the unavailability of Jerry Cassaday, I'm sure there is no one in this courtroom that would deny that it would be better if Bruce Miller was alive and Jerry Cassaday was alive and we probably wouldn't even be here on this Saturday morning. The fact is that that's not the current case we face.

Your Honor, counsel speaks of the constitutional right of confrontation of witnesses, but the courts historically, your Honor, have recognized that if that was taken literally we wouldn't have hearsay exceptions because the--by their very nature they're not subject to cross-examination in a courtroom. And so the mere fact that--that something may impact the confrontational right of the defendant doesn't in and of itself automatically mean that they are therefore gonna be

inadmissible.

I would like to take defendant's argument perhaps in two pieces, your Honor. First of all, the Canan related argument as to the examination of the suicide note which I believe we are speaking to at this moment, and then the Michigan approach to that same issue.

Your Honor, first of all, I'd like to point out on the record that the Canan case when it is read, the first opinion that is offered is actually the minority opinion on this particular issue which I think was entitled 4B in that opinion itself. You read through the case and at least for the first reading you're kind of assuming you're reading the ultimate opinion of the court, and then at the very end the judge says, of course, the other two judges did not agree with me on 4B. So you kind of have to go to the second portion to find out the court's ruling on the section 4B dealing with the admissibility of--of this particular item, and in that case as counsel correctly pointed out was a videotaped statement earlier made by a then deceased witness.

And, your Honor, I think it is worth note, that even under the analysis presented by defense counsel of a line by line determination, I think it is a very worth note that ultimately in Canan they allowed this entire

tape in, as near as can be told by the opinion, and so, I would caution too much reliance on that statement of the line by line examination of the statement sought to be admitted.

And, of course, Canan relied in great part on Williamson versus United States. Williamson had actually I believe been appealed--or the appeal in Canan was filed prior to the ruling in Williamson, but decided after the ruling in Williamson was published, so they were very close in time.

The--the Supreme Court, U.S. Supreme Court in Williamson simply defined the--the word statement and looked to the commentary of the court rules and other case law and said that under the federal rules, as a matter of federal law, the--the term statement would be each individual part that tended to either be ex--or inculpatory to the declarant or non-inculpatory to the declarant, and that once you have established that as the definition, then it required federal courts to look at each portion of the statement. And as Canan said, it's not to see that each portion is self-inculpatory, but the line by line determination is to--to make a determination based on the totality of the circumstances that each line has some indicia of reliability and trustworthiness, and then either portions or all of that

statement could be admitted.

I think even under that more narrow reading, your Honor, this suicide statement would come in because I think that the parts of the statement that are not self-inculpatory are--have indicia of reliability and trustworthiness. I mean, the very nature of a suicide note, and in fact, we argued at the district court level that this suicide note, one of the theories of admission is that it's a--a statement under belief of impending death, and your Honor, I would reassert that today for the record that it is our position that's--

THE COURT: I was gonna say, wasn't that your principal theory and I thought it was from Ms. Mabry's submissions before.

MR. PLUMMER: It--it was a basis for the People's argument, we wound up arguing in the alternative, and the judge chose one of those other alternatives, but it's our--and if the Court would like me to speak to that very briefly I would like to summarize at least just so there is a record of why we believe it was still admissible under that.

And that is, that it was a statement made under a belief of impending death by the declarant about the cause or circumstances surrounding that death.

The--the only legal issue that was raised in

terms of that particular exception was that there is some--there is some statements made by some Michigan courts that one of the elements for that admission is that the statement of course has to be offered for admission during a homicide proceeding, and--and some courts have at least referred to the concept that the statement has to be referred under a homicide proceeding regarding the death of that declarant. But, your Honor, two things about that last element.

Number one is, every time that I could find that it was stated in a case in Michigan that was not an issue, those cases were cases where the--it was the declarant's death that was the element of the trial at hand.

And second of all, all the courts that I could find relied on a case that was decided prior to the Michigan Rules of Evidence being made applicable in Michigan.

So for those two reasons we would claim that those statements were *dicta* in those cases and that there is no indication of that requirement in the Michigan Rules of Evidence themselves, and therefore, the suicide note should be admitted under 804(b)(2).

But if not, your Honor, they should be admitted, it should be admitted under 803(3) a statement against

interest, and more specifically, a statement against penal interest, and that is where I would like to take the Court from Canan to the Michigan law. Michigan did have a chance to contemplate Williamson versus United States as it was interpreted by Canan, and the Michigan Supreme Court in People versus Poole, P-o-o-l-e, cited in our brief, made reference to Williamson and specifically--and looked at the commentary under the proposed court rules before they were enacted and the rules--the commentary presented after they were enacted and simply came to a different conclusion then the U.S. Supreme Court about Michigan's Rule of Evidence and about how statements should be interpreted in Michigan. And the court was very clear and I point that out in my memorandum to the Court and counsel, the court was very clear in stating that that is not a consideration in Michigan, that the statement is the statement in--in its entirety, and that was supported, Poole was supported and followed in Beasley, cited in the brief, and it was also in Schutte, S-c-h-u-t-t-e, cited in our brief, and I believe there may have been some reference in People versus Ronald Lee that was also cited in our brief.

But, your Honor, under Michigan the analysis is not one of line by line, and in Michigan the analysis is to look at the statement to determine if the declarant

inculpated him or herself in the statement, and your Honor, I--I would like to make an aside here about the Barrera case mentioned by defense counsel a couple times.

I think one should be cautious in relying on Barrera in the case that we are talking about here because in Barrera what was offered was a statement to exculpate the defendant and there is an entire--

THE COURT: Right--

MR. PLUMMER: --different set of circumstances in analyzing that--

THE COURT: Correct.

MR. PLUMMER: And, but back to a statement that inculpates the declarant, your Honor, here we have a man who says I drove there and killed him. I don't think it can be any more in--self-inculpatory then that. Now, he goes on to say that Sharee was involved and helped set it--helped set it up.

Counsel makes much, your Honor, of the fact that the declarant in this case appeared to be upset with the current defendant, Sharee Miller. I believe there is a footnote in Poole that the--that the declarant in Poole was upset with the defendant as well and had written to the prosecutor to talk about cutting some sort of deal to testify. So I don't think that in and of itself is

determinative.

Also, there was some mention made about the fact that he refers that he is going to tell the police and that she will get hers, and that one of the criteria mentioned in Poole is whether a person makes a statement to a colleague or family or friend versus law enforcement. Well, this statement was addressed to mom and dad, obviously, a close relative which would be in favor of admission under Poole.

To the extent he makes reference to law enforcement, I think the Court needs to remember that in Canan the statement was given to--I think it was a U.S. Attorney, who is obviously involved in law enforcement.

And in one of the cases relied on, either Canan itself or one of the cases relied on by Canan, the court goes to some extent to offer that an--an indicia of reliability in that case was that the declarant knew that his statement was going to law enforcement and they would be investigating it as though it were an element to cause an--an addition to the indicia of reliability not a detraction from it. So I think that must be taken in stride.

Counsel talks about using Exhibit--Proposed Exhibit 1 and Number 2 to corroborate each other as being inappropriate.

Well, under Poole and the cases that followed, your Honor, the court said that, a court in deciding whether or not to admit a statement has to look at the totality of the circumstances. And I think the totality of the circumstances are in this case are the one, there was a suicide note to mom and dad that--where the declarant inculpated himself in a--in a murder and a reference to the defendant herein Sharee Miller.

Your Honor, once you take that, and once you understand that he is writing this note as his suicide note, I think that that gives this statement under the totality of the circumstances an indicia of reliability. There is--there is a statement by the majority court in Canan where they make a reference to those cases commonly heard in law school and otherwise, about no one would speak--leave this earth with a lie upon their lips, and the fact that those facing imminent death, there is a presumption under law that statements made at that time would tend not to be false because one was about to quote, meet their maker.

So, your Honor, I think that a suicide note may best express the very guarantees of trustworthiness that are spoken about in a hearsay statement to be offered, it's the statement against penal interest.

Finally, your Honor, the examining court at the

district court did, I believe, ultimately rely at least in great part on the catch-all provisions, I believe that was 804(b)(6) in admitting this item.

Your--your Honor, while I personally don't think it is necessary to get to that point because I think there are other clearcut hearsay exceptions that are well founded and, your Honor, it is worth note that this whole indicia of trustworthiness really comes into play in the catchall more than it does the statement against penal interest because the general rule of law is that in the alternative when confrontation clauses are at issue, it either has to be a well-found hearsay exception or have other indicia of reliability and trustworthiness.

So I would state that under penal interest that really isn't a requirement even though it is there, but under the catchall, your Honor, for the reasons I have already stated, I believe this statement does show under the totality of circumstances the indicia reliability and guarantees of trustworthiness that would allow the examining Court to admit this under the catchall provisions of the court rule.

If I could have one second, your Honor?

THE COURT: All right, certainly.

MR. PLUMMER: Your Honor, Ms. Mabry points out

to me something that is worth note, and that is that at the time Poole was decided actually there wasn't the catchall provision, and there was some note in that reference to that case that if there had been such a catch-all provision that it might also have applied in that case, but that's why it wasn't specifically dealt with in Poole.

THE COURT: Maybe I'll just make this comment initially now. I don't think the catchall is a particularly good theory for you or me, any of us to rely on since there is even a Michigan case, People v Wells that says it's not a, quote, firmly rooted exception to the hearsay rule. And there's numerous federal cases that say the same thing, and so, if you're looking at reliability, all the way back to Ohio v Roberts they talk about the need for a firmly-rooted exception or in the alternative other particularized guarantees of trustworthiness, so I really kind of thought we should just probably leave that one out. That's my basic view on it and just save a lot of time arguing about it today.

MR. PLUMMER: Thank you, your Honor.

THE COURT: Unless you have some other cases that I haven't seen.

MR. PLUMMER: Well, your Honor, the only--the only other reference--

THE COURT: On that issue--

MR. PLUMMER: Okay. The only--the only reference I would make in that regard is the--that was the very distinction I was trying to make at the end of my argument is that this whole idea of independent indicia of reliability and trustworthiness really only comes into play more with the catchall than the other firmly rooted exceptions. Thank you.

THE COURT: Okay, great, thank you.

Now, briefly, if you have something else on this particular exhibit, Mr. Nickola.

MR. NICKOLA: Yes, Judge.

And again, Judge, maybe I was wrong, I--I thought we were talking about as it relates to the Motion to Quash.

THE COURT: We are.

MR. NICKOLA: Okay.

THE COURT: You have the Motion to Quash and the basis for the motion is if there is no evidence you can't bind it over, isn't that right?

MR. NICKOLA: Right, Judge.

THE COURT: So we will take the two, I guess the two critical--

MR. NICKOLA: The only--

THE COURT: --but certainly--

MR. NICKOLA: Yeah--

THE COURT: --the other items were introduced and we will cover all of them, I hope, today.

MR. NICKOLA: Thank you, Judge.

In response, your Honor, at least there is the discussion about this dying declaration. That is not I believe at issue with this particular motion. Judge Hughes--

THE COURT: Why not--

MR. NICKOLA: --did not rely upon--

THE COURT: Okay. But let me tell you, we have a huge body of Michigan law, the right result for the wrong reason. So if he concludes they're sufficient evidence to bind it over, I'm really not concerned whether he addressed the correct or what I might consider the correct prong of the Michigan Rule of Evidence in getting it over here, just that--

MR. NICKOLA: Well--

THE COURT: --he did find there was a valid reason and I might disagree on which reason he chose.

MR. NICKOLA: I understand, your Honor.

I--I just wanted to respond because it was a question that the Court had asked him about and he given some argument about it, and I did not address it in my initial argument because the judge didn't use it as a

basis, I understand what the Court is indicating.

I would simply say, Judge, that I have attached case law and Mr. Plummer can speculate what may or may not be *dicta*, but he certainly has centuries worth of law to look at, they have attached nothing, no federal, no state, Supreme Court, Michigan or otherwise, that would support their position as it related to that dying declaration. I believe that's why Judge Hughes didn't address it because I think what is clear is not only in the cases that I cited, Parney and also in the Siler case as well, you've got to be an extremist at the time you make this particular statement, and Mr.--at the time of the statement. And in this particular case Mr. Cassaday was harmed physically in no way whatsoever at the time he made these statements. And here is the problem as well, Judge, as a part of the reliability aspect of this document.

It's not dated, we have no idea when he wrote it. Alls(sic) we can assume, Judge, is that his signature is bared on it. So whether he wrote it way back when, when he claims he did this or three months later after he comprehended it, whether he was in a drunken stupor or using his prescription drugs as testified to during the preliminary exam. There was no autopsy done so we have no idea whether this man was delusional or

not. I think that that's important issues to look at because when we--again we talk about what is this person about, who--who they are about, there is nothing that would suggest that he has got any credibility whatsoever and simply because he has got this suicide note, that doesn't mean that he is an extremist at the time. So, Judge, I'm not going to reiterate my arguments, but I would indicate to the Court that at least as the Court may have had an inquisitive line of questioning regarding the dying declaration, there is nothing that supports their position in--in a case of this particular magnitude. And I don't think that Judge Hughes gave it any weight for a good reason.

THE COURT: All right. Well, regarding this particular document only then, which has been referenced as the suicide note, and alternative theories have been advanced for the admissibility because obviously it's hearsay. And the Court believes there are at least two possible theories and that the judge did not abuse his discretion in this regard, and I will indicate that the dying declaration argument seems to be to the court--to this Court, the preferable theory under which this document should be admitted, and that would be 804(b)(2) of the Michigan Rules of Evidence, effective 3/1/78. And that might be significant because as pointed out today

most cases, I believe virtually all of the cases keep going back to the four requirements from People v Schinzel and People v Parney which is 98 Mich App 571, but those predate, the rulings in those cases predate the Michigan Rules of Evidence, and the particular language of the Michigan Rules of Evidence have been addressed in the commentary to Courtroom Handbook on Evidence by Professor Robinson and Longhofer, and they suggest, as I am thinking today, that the rule really has not been looked at in light of the specific language of the Michigan Rule of Evidence, and the Court believes that that is the reason why this particular document will be admissible. That it is admissible as a dying declaration. This is a prosecution for homicide. The statement appears to be made by a declarant while believing that the declarant's death was imminent. This is addressed to the parents of the declarant expressing to the parents certain personal matters, but an explanation in a nutshell of why he reached this point in his life, and concerning therefore the cause or circumstances of what the declarant believed to be impending death and referenced therein is his own intent to take this way out, shall we say. And I recognize that that may not be Judge Hughes' thinking, but in any event, that is what I consider the preferable theory, and then alternatively, of course, as

has been argued by the prosecutor today, certain parts of it may be admissible under different theories and some of the statement itself or some of the document, let's put it that way, may not be offered to prove the truth of anything. So if we were going to do an analysis under Canan, I think that it would be agreed by everybody that, frankly, very little of it is offered to prove the truth of it, and the significant parts would certainly include the phrase or the sentence, I drove there and killed him, which certainly could be admissible and I believe Judge Hughes so indicated. A statement against interest under 404(b)(3), a statement which was at the time of its making so far contrary to the declarant's, I'm sorry, a statement which was at the time of its making intended to subject the declarant to civil or criminal liability. Certainly, had he lived and had this statement been found, it would certainly subject him or have subjected him to criminal liability, and the fact that he chose the other way out does not detract in this Court's opinion from the viability of that particular exception to the hearsay rule as a theory of admissibility.

And going to the second prong of the admissibility, Judge Hughes was well familiar with the Poole case at 444 Michigan 151, and we have all talked today about

the indicia of reliability necessary to establish that a hearsay statement should be admitted. Going back to Ohio v Roberts, reliability can be inferred without more in a case where the evidence falls within a firmly-rooted hearsay exception. In other cases, the evidence must be excluded absent a showing of particular-- particularized guarantees of trustworthiness.

If the People were to rely on and the Court were to rely on, for example, the catchall exception, certainly the factors set forth in Poole favoring admissibility, set forth at page 165, would be present in this situation. Certainly, it was voluntarily given, it was made contemporaneously from everything I can glean from reading the transcript and reviewing the exhibits, contemporaneously with the events referenced, that is, his own impending death. It was made to family members, mom and dad, that is, to someone to whom the declarant would likely speak the truth, and certainly, it was uttered spontaneously in the sense it's without prompting or inquiry by anybody.

So I think that there are sufficient guarantees of trustworthiness so that Judge Hughes did not err either in finding exceptions within the Michigan Rules of Evidence and in finding there were particularized guarantees of trustworthiness from the quote, totality

of the circumstances, end quote.

And the Court is fully aware that those are those that surround the making of this statement and we have just discussed the circumstances surrounding the making of the statement.

So moving on now then to I guess you wanna go to the instant message of November 8, is that correct, which has now been marked as Exhibit 2?

(No verbal response)

Mr. Nickola, regarding instant message, Exhibit 2, do you wish to make your argument now, please?

MR. NICKOLA: Judge, as it relates to the Motion to Quash with Judge Hughes?

THE COURT: It's--I thought that is what all this was?

MR. NICKOLA: Yes.

THE COURT: Yeah.

MR. NICKOLA: I--I thought I made arguments concerning both--

THE COURT: You wanna respond then to that one, I think if there is anything else in that regard, Mr. Plummer--

MR. NICKOLA: Judge, I thought that--

THE COURT: --that you didn't--he spent most of his time I thought on dying declaration, so--

MR. PLUMMER: Your Honor, excuse me, I thought that those arguments had been divided--divided and I refrained from any other than the suicide note--

THE COURT: All right.

I think I will make one other reference. There was another case that dealt with the situation on a dying declaration in this context, I'll just put in the record, State of West Virginia case that I had happened to find the other day, it's at 457 Southeast 2d 440, regarding a suicide note, so.

In any event, whatever else you wanna say about the instant message which I believe is now Exhibit Number 2 please, let's do that. Anything else if you wish, Mr. Nickola, if not, we will let them finish whatever argument they wanna make.

MR. NICKOLA: Judge, I don't have anything else other than what I have already put on the record.

THE COURT: All right. Then which everyone wants to comment on that issue, I wanna find it again here. There it is.

MR. PLUMMER: Thank you, your Honor.

My comments now will be in reference to People's Proposed Exhibit Number 2 which we have referred to as an instant message or instant chat.

Your Honor, the preliminary examination

transcript I think can stand for a general explanation of the nature of--of what this is and I'll simply restrict my comments today as to as matters of law its admissibility into this court proceeding.

Your Honor, of course I do need to indicate that it is a statement from what was testified at the preliminary examination as an account, owner-controlled by Sharee Miller which included the--what is known as a screen name, Sharee 1013, and it was a chat between that account and an account owned by Jerry Cassaday wherein the screen name, one of the screen names listed was JLC 1006, and your Honor--

THE COURT: Do we not wanna make a clear comment today that the portions of this message that come from Sharee Miller, obviously, come in under possibly different theories than those portions attributable to the deceased, Jerry Cassaday?

MR. PLUMMER: Yes, your Honor.

Would the Court want me to speak about those individually?

THE COURT: Well, I just wanna make sure we are all clear because if we need to put that on the record if there is any issue about it.

Mr. Nickola, hers obviously come in under a different theory perhaps than his. Do you see what I'm

saying? The document has statements attributable to the defendant, statements attributable to the deceased Cassaday, and obviously the statements attributable to her can be offered by the People under 801(d)(2), and that's not what we're doing with regard to the portions attributable to Jerry Cassaday, correct?

MR. PLUMMER: That's correct from the People's position, your Honor.

THE COURT: All right.

MR. PLUMMER: I don't know if the Court was waiting for a comment from Mr. Nickola or not.

THE COURT: I didn't know if there was any other, I just wanna be sure we're all understanding we're speaking of today I thought the real key would be, well, maybe I'm wrong.

MR. PLUMMER: That's what I thought the--

THE COURT: The entirety of the document is one thing, the technical foundations that's not the issue, it's the admissibility, as I understand it, of the substance of these documents under the hearsay rules because obviously they're hearsay. Her statements are included in this exhibit and her statements are one thing under 801(d)(2) and it is going to be offered by your office, I assume, against the party defendant Ms. Miller--

MR. PLUMMER: Correct--

THE COURT: --to the extent her statements are included in any of the documents we are looking at here today.

MR. PLUMMER: Correct, your Honor.

THE COURT: And then it's perhaps his that you're really concerned about, so that's why I wanna to make the distinction because both persons appear to speak here, we have Sharee at 1013 and then we have, as you put it, JLC at 1006.

MR. PLUMMER: Thank you, your Honor, and restricting my comments to his portion of this instant message, your Honor, the People were of the position and are of the position that his portions would come in under anyone of three particular exceptions starting with the least, I'm trying to look for the right term, that--that we would rely upon the least but still believe apply, your Honor, would be the catchall provisions of 804(b)(6) and we have already discussed the legal aspects of that, and we think that that would equally apply to the statement.

Secondly, more strongly, your Honor, we submit that taken *in toto*, Mr. Cassaday's portion of this statement would come in under 804(b)(3), a statement against interest. While he doesn't say as clearly as he

did in his suicide note, I killed Bruce Miller, I'm going to kill--kill him, this sets out an entire plan, scheme, and design to effectuate the death of Sharee Miller's husband, Bruce Miller. Your Honor, we think that that could come in as not hearsay because it does show that scheme, plan, or design under 803(3), but we think it also is a statement against penal interest when --when if you take the logical consequences of these statements they are setting out a method of murder.

Finally, your Honor, we believe that his portion of this would be totally admissible under 801(d)(2)(E) statement by a co-conspirator. Your Honor, the--that rule requires independent source of some evidence of that conspiracy and we would submit that that suicide note does exactly that, and once we have shown that, that this statement comes in *in toto* as a statement by a co-conspirator about the nature of the conspiracy. Thank you, your Honor.

THE COURT: Just if I could ask you while you're there, Mr. Plummer. As you can see, if you look at the document, let me see how many pages it is here, one, two, it seem to have ten pages, correct, is that what everyone agrees--

MR. NICKOLA: Yes, your Honor--

THE COURT: --that is printed out here.

MR. PLUMMER: Yes, your Honor.

THE COURT: Just to clarify in my mind, are you planning or is your thinking that you would be wanting to offer all ten pages?

MR. PLUMMER: Correct, your Honor.

THE COURT: The document.

Just assuming we didn't have the conspiracy exception available, are you trying to suggest to the Court under the statement against interest that each and every time that we have a communication from Mr. Miller(sic) that it would qualify as a statement against interest, I guess I'm still in the Canan mode here?

MR. PLUMMER: Well, your Honor, I'm more in the Poole mode myself--

THE COURT: All right.

MR. PLUMMER: --but I understand what the Court is stating and I don't think it would apply at each and every time, now we picked out, these are two of the People's exhibits and they happen to be exhibits wherein in the suicide note he just blankly states I killed him, and in the number two, the instant message, they are talking about how to kill him. I think that those two situations--statements against that penal interest do apply. If--if Mr. Cassaday were alive, your Honor, there would be every reason to believe that he would be

aware that this conversation would be used against him to prove his participation and the fact of the murder of Bruce Miller, and it's for that reason, your Honor, I'd submit they were--this is just as weighty as the suicide note in that regard. But if there are--

THE COURT: Well, just let me take both of you to look at page 2 for a minute, while we are all together, because if you would look at it, I think the first time we truly get into what might be a statement against interest would be on page 2 and it is about a third of the way down and it is a question actually, what is the fastest way into the yard from 75. That's really a question, so it is not even a statement, so we don't even--

MR. PLUMMER: Excuse me, your Honor, what was that again, I'm having trouble--

THE COURT: Page 2, about the third of the way down, it looks like the first time he is speaking on this detailed plan about the murder, is his question, What is the faster way into the yard from 75, do you see that?

MR. PLUMMER: Yes, your Honor.

THE COURT: Page 2.

Now, that's a question, so obviously questions and commands are among the categories that aren't

statements, so they're not involved in hearsay anyway.

MR. PLUMMER: Your Honor, I would ask the Court to consider the--the next exchange up from that as being the beginning of something relating--

THE COURT: Let's see now--

MR. PLUMMER: --it says, How do we hook up to-morrow. There are other--there are other e-mails where--

THE COURT: How do we hook up t-o-m-m, mine says?

MR. PLUMMER: Yes, yes. And it says I need a little time in the morning to come up with a plate--

THE COURT: Again that's a question.

MR. PLUMMER: Um-mm. But I'm just asking the Court to consider one--

THE COURT: To move up a little bit--

MR. PLUMMER: --two lines up, yes.

And, your Honor, I apologize but I didn't quite follow the Court--what the Court was saying that the significance of the fact that it was a question.

THE COURT: Questions aren't statements within the meaning of the hearsay rule, nor are commands, like turn left, jump over the cliff. Questions aren't state-ments either.

MR. PLUMMER: Okay.

THE COURT: So anyway, the first two things that are on here where it is suppose to be Jerry Cassaday are questions, and you keep going down the line and the next, Is that closer to the yard; another question, which is best for, it's hard to tell, Which is best for less being seen, I guess that is what it says.

First time you really get to an affirmative statement by Cassaday you're on page 3 when he says, I can get it from there.

MR. PLUMMER: Correct, your Honor.

And he does say I'm with you just above that, but I think that's just a confirmation.

THE COURT: That's state of mind, I suggest.

MR. PLUMMER: Yes.

THE COURT: All right, Mr. Plummer, I just wanted to have you understand my thinking a little bit, so go ahead, anything else?

MR. PLUMMER: Nothing from the People, your Honor.

THE COURT: Okay. Mr. Nickola, please.

MR. NICKOLA: Judge, if I just--in response to an indication is, I believe, that the instant message formulates the basis of their contentions in this particular case. I believe that admittance under the law that was provided at the district court denies my client

an opportunity to confront Mr. Cassaday.

I would also indicate that it is quite clear that there was a very small amount of evidence that even suggested or could be relied upon by the Court, this was something that was actually done at the time, and in fact, certainly could be manipulated and fabricated and for anyone to argue that my ability based upon this statement because I believe even the police testified, Sergeant Potrafka, that there is some inconsistencies in terms of what actually happened in that particular document, that to make a contention that my opportunity to cross-examine Mr. Cassaday concerning this, if in fact it was as the prosecutor alleges, Judge, I think would be nonsensical. That it would have--not add anything to a jury's decision in this particular case.

THE COURT: All right. Well, starting out with the ten-page instant message that seems to be dated at the bottom November 8, 1999.

The Court understands the theory of the People that the entirety of the document should come in. Certainly the portions attributable to the Defendant Miller come in under the party admissions, so-called party admission exception.

The responding communications from JLC 1006 can be dissected, I suspect, either as a whole and come in